

Court of Appeals, State of Michigan

ORDER

People of MI v Ray Kalak

Docket No. 276995

LC No. 06-011233-01

William C. Whitbeck
Presiding Judge

Kathleen Jansen

Alton T. Davis
Judges

The Court orders that the March 4, 2008 opinion is hereby AMENDED. The opinion contained the following clerical error: the parties were incorrectly labeled in the caption. The plaintiff should have appeared as Plaintiff-Appellee and the defendant should have appeared as Defendant-Appellant.

In all other respects, the March 4, 2008 opinion remains unchanged.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAR 20 2008

Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RAY KALAK,

Defendant-Appellee.

UNPUBLISHED

March 4, 2008

No. 276995

Wayne Circuit Court

LC No. 06-011233-01

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

PER CURIAM.

A jury convicted defendant of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). He was sentenced to concurrent prison terms of 20 to 50 years for the CSC I convictions and 5 to 15 years for the CSC II convictions. He appeals his sentences as of right, and we affirm. This appeal is being decided without oral argument. MCR 7.214(E).

Defendant assaulted the complainant in his home. The complainant was 11 years old at the time. The complainant's grandfather was also present in the home. The complainant testified that on three occasions when she took her grandfather something to eat or drink, defendant took her into a different room of the house and assaulted her. Defendant fondled her breasts, placed his finger inside her vagina, and made her touch his penis. During the first assault, defendant told the complainant that she should trust him, and that he would kill her if she told anyone. The complainant testified that she believed defendant when he threatened her. After the third assault, defendant told the complainant that he wanted to have sex with her. The complainant went home and cried, but did not want to upset her mother and therefore did not tell her what had occurred. However, the complainant told a friend and her school counselor about the assaults the next day. The complainant testified that she did not ask for help from her grandfather during the assaults because she was in shock and did not know what to do.

Defendant's minimum sentence of 240 months for the CSC I convictions exceeded the guidelines range. During sentencing, defense counsel challenged the scoring of 50 points for offense variable (OV) 7. The trial court stated that the scoring was appropriate based on the facts of this case. The trial court also stated that it would be exceeding the guidelines based on the complainant's "tender age" and the fact that defendant tried to bribe the complainant's parents into not pursuing criminal charges.

On appeal, defendant does not specifically challenge the trial court's rationale for exceeding the sentencing guidelines. Instead, defendant argues that the trial court misscored OV 7, OV 4, and OV 10. Defendant contends that because these offense variables were misscored, the trial court relied on inaccurate information at the time of sentencing and thereby deprived him of due process.

A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We will uphold scoring decisions provided that they are supported by a preponderance of the evidence. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). We review de novo the interpretation of the statutory sentencing guidelines. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003).

Defendant argues that the trial court misscored OV 7. We disagree. OV 7 addresses aggravated physical abuse. A trial court may score 50 points for OV 7 if “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a). A trial court must score zero points for OV 7 if “[n]o victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(b). “[S]adism” means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender’s gratification. MCL 777.37(3).

The trial court properly scored 50 points for OV 7. The complainant testified that during the first assault, defendant told her that he would kill her if she told anyone. This conduct was specifically designed to increase the complainant’s fear and anxiety so that she would not tell anyone about the abuse. We find no error in the scoring of OV 7.

Defendant also argues that the trial court improperly scored 15 points for OV 10. We disagree. OV 10 addresses “exploitation of a vulnerable victim.” A trial court may score 15 points for OV 10 if “[p]redatory conduct was involved.” MCL 777.40(1)(a). A trial court may score 10 points for OV 10 if “[t]he offender exploited a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status.” MCL 777.40(1)(b). A trial court may score five points for OV 10 if “[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious.” MCL 777.40(1)(c). A trial court must score zero points for OV 10 if “[t]he offender did not exploit a victim’s vulnerability.” MCL 777.40(1)(d). “‘Predatory conduct’ means preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a).

Defendant contends that, apart from the complainant’s age, no evidence presented at trial supported a finding that he engaged in predatory conduct. Defendant is mistaken. The evidence in this case showed that defendant waited for his 11-year-old neighbor to arrive at his home with refreshments for her grandfather before taking her into another room when her grandfather was busy and sexually assaulting her. When this strategy succeeded, defendant repeated it. We find no error in the scoring of OV 10. See *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003) (affirming a score of 15 points for OV 10 and finding evidence of preoffense

predatory conduct where the defendant waited until his 9-year-old victim was alone folding laundry in the basement before sexually assaulting her).

Defendant finally argues that the trial court incorrectly scored 10 points for OV 4. We disagree. OV 4 addresses “psychological injury to a victim.” A trial court may score 10 points for OV 4 if “[s]erious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34(1)(a). A trial court must score zero points for OV 4 if “[n]o serious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34(1)(b). The trial court should “[s]core 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.” MCL 777.34(2).

The testimony of witnesses who observed the complainant after the last assault supported a finding that the complainant had suffered serious psychological injury, including shock, fear, and guilt. It was not unreasonable for the trial court to recognize that a young victim of repeated sexual assaults may require psychological treatment. The evidence adequately supported the score of 10 points for OV 10, and we find no error in this regard.

Affirmed.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Alton T. Davis